No. 26.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

FRANCISCA L. DE MARTIN,

Appellant,

VS.

JAMES PHELAN,

Appellee.

BRIEF FOR APPELLEE.

WM. F. HERRIN,
Solicitor for Appellee.

H. L. GEAR,
Of Counsel.

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vs.

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APPELLEE'S BRIEF.

The only question to be considered is whether the demurrer to the bill was properly sustained. This question is answered by the opinion of the learned Judge who decided the cause, reported in 47 Fed. Rep., 761, a copy of which is appended to this brief.

I. *No case of Intended Mortgage by Deed Absolute.*

The bill alleges that the defendant had purchased mortgages against her property, amounting to the sum of $185,000, and that by means of the said mortgage indebtedness he induced the complainant to transfer the property to him for $19,000, and "thereupon, on the 4th day of November, 1881, your oratrix did make, execute and deliver to said defendant a deed of conveyance to said property

in consideration of said sum of nineteen thousand dollars, and because of her helpless and destitute condition aforesaid, of which said defendant took advantage in securing said deed" (Transcript, pp. 8–9). There is no pretence of any allegation that either party understood or intended that this conveyance was to be a mortgage, or was in any manner to secure the repayment of the $19,000 purchase money paid therefor, or to secure the payment of the original mortgage debt. It is evident that the real consideration of the deed was the extinguishment of the mortgage debt, amounting to $185,000, besides the purchase money paid, aggregating $204,000, for the property.

The mortgages were merged in the title and extinguished by operation of law, in the absence of any intent of the parties to keep them alive.

Whether a deed is in effect a mortgage is a question of the agreement or intention of the parties to effect a security for indebtedness.

People vs. *Irwin*, 18 Cal., 117.
Sears vs. *Dixon*, 33 Cal., 330.
Henley vs. *Hotaling*, 41 Cal., 22.
Montgomery vs. *Spect*, 55 Cal., 352.
Davis vs. *Baugh*, 59 Cal., 574.
Cook vs. *Lion Fire Ins. Co.*, 67 Cal., 369.

II. *No case shown for Rescission or Cancellation of the Conveyance.*

There is no pretense of any allegations in the complaint of any false representations or fraudulent conduct of the defendant inducing the deed, nor is it alleged in the terms of the Civil Code of California upon the subject of undue influence as

a ground for rescission, that the defendant obtained any "*unfair advantage*" by the use of "*confidence*" or "*authority*," or took any "*grossly oppressive and unfair advantage*" of complainant's "necessities or distress."

Civil Code, Secs. 1575, 1689.

Nor is there any pretense that any notice of rescission or offer of restitution of the money paid was given or made within a reasonable time, which is absolutely essential in order to effect a rescission of the conveyance.

Civil Code, Sec. 1691.
Fratt vs. *Fiske*, 17 Cal., 380.
Gifford vs. *Carvill*, 29 Cal., 589, 593.
Morrison vs. *Lods*, 39 Cal., 381.
Barfield vs. *Price*, 40 Cal., 535.
Bohall vs. *Diller*, 41 Cal., 533.
Herman vs. *Haffenegger*, 54 Cal., 161, 164.
Collins vs. *Townsend*, 58 Cal., 615, 616.
Goodwin vs. *Goodwin*, 59 Cal., 560, 562–3.
Burkle vs. *Levy*, 70 Cal., 250.
Bailey vs. *Fox*, 78 Cal., 396.
Wainwright vs. *Weske*, 82 Cal., 193, 196.
Hammond vs. *Wallace*, 24 Pac. Rep., 837.
Grymes vs. *Sanders*, 93 U. S., 55, 62.

III. *No Case of Trust Ex Maleficio.*

There being no allegations of fraud, undue influence or oppression, or of any breach of trust relation, or of such gross inadequacy of consideration as to amount *per se* to constructive fraud, there is no more ground for the enforcement of a trust *ex maleficio*, than there is for a rescission of the deed.

A trust *ex maleficio* is fastened upon the con-

science of an offending party who has acted unconscientiously by circumvention, imposition, fraud, undue influence or oppression, or by taking undue advantage of a confidential relation, or by other wrongful act.

2 Pom. Eq. Jur., Sec. 1053.
1 Perry on Trusts, 166.
Civil Code, Sec. 2224.

Inadequacy of Consideration.

The only pretense of inadequacy of consideration is the difference between $204,000 and $230,500. There is no allegation that complainant could have obtained any higher sum for the property than was paid by the defendant, or that he prevented her in any manner from obtaining more, if she could. It is very evident that if he had foreclosed the mortgage he could have obtained the title for $19,000 less than he paid.

There may be an adequate consideration to sustain a grant without the necessity of full compensation to the grantor upon his estimate of value; and it is well settled that mere inadequacy of consideration in that respect, where it is unconnected with circumstances of fraud, or is not so gross and excessive as to shock the conscience and moral sense of mankind, and to be demonstrative of fraud, is not ground for setting aside or cancelling a conveyance in equity, as between persons competent to contract and occupying no fiduciary relation to each other.

Phillips vs. *Pullen*, 45 N. J. Eq., 5; 16 Atl. Rep., 11; 18 Atl. Rep., 849.
Copis vs. *Middleton*, 2 Madd., 556.

McHarry vs. *Irvin*, 85 Ky., 322.
Wood vs. *Craft*, 85 Ala., 260.
Pennybacker vs. *Laidley*, 11 S. E. Rep., 39.
Weber vs. *Weitling*, 18 N. J. Eq., 441.
Eyre vs. *Potter*, 15 How., 42, 60.
Matheney vs. *Sanford*, 26 W. Va., 386.
Bridges vs. *Linder*, 60 Iowa, 190.
Osgood vs. *Franklin*, 2 Johns. Ch., 1, 23.
1 Story's Eq., Secs. 245, 246.
Pomeroy's Eq. Jur., Sec. 926.

Even where the inadequacy of consideration or price is so gross as to be demonstrative of fraud, "the *fraud*, and not inadequacy of price, is the true and only cause for the interposition of equity, and the granting of relief."

Pomeroy's Eq. Jur., Vol. 2, Sec. 927.

IV. *No Mortgage under Rules Governing Trust Relations—No Trust Relation between Mortgagor and Mortgagee.*

It is manifest that complainant has staked her whole bill of complaint upon the theory that the bare relation of mortgagor and mortgagee, accompanied by partial inadequacy of consideration, will vitiate the conveyance from the mortgagor to the mortgagee, and that it will be avoided at the mere will of the mortgagee, upon an offer to redeem.

The authorities cited by complainant, so far as they hold that a mortgagee is bound to show that a conveyance to him by the mortgagor of the "equity of redemption" was for the full value of the property, else the mortgagor may avoid it, rest upon the application of the principle of a *trust relation* be-

tween the parties, growing out of the common law doctrine that a mortgage passed the legal title and made the mortgagee a trustee of the mortgagor, leaving only in him a mere "*equity of redemption.*"

But under the jurisprudence of this State there is no trust relation between a mortgagee and a mortgagor, as it is impossible that the mortgagee could take a legal title at the time of the mortgage, since *no contract for a lien can transfer title* to property in this State, notwithstanding an *express agreement to the contrary.*

Civil Code, Secs. 2888, 2924, 2925.
Taylor vs. *McLain*, 64 Cal., 514.
Jackson vs. *Lodge*, 36 Cal., 28.
Cunningham vs. *Hawkins*, 27 Cal., 606, 607.

A mortgagor remains the owner of *the legal estate*, to all intents and purposes, until deprived thereof by foreclosure, sale, or subsequent voluntary conveyance by himself, and the mortgagee has a mere lien upon the property as security for his debt, and has *no estate in the land.*

Goodenow vs. *Ewer*, 16 Cal., 467.
Dutton vs. *Warschauer*, 21 Cal., 621.
Mack vs. *Wetzlar*, 39 Cal., 247.
Williams vs. *S. C. Mining Assn.*, 66 Cal., 201.

By virtue of the rule as now obtaining in most of the States, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure. His interest in the land is regarded as personalty, and is subject to the rules governing that species of property. * * * *As the relationship of mortgagor and mortgagee is not considered to be of a fiduciary character, the mortgagee,* whether in possession or not, *is entitled to purchase from the mortgagor his estate and interest in the land.* In the event of the mortgagor's title being sold under execution the mortgagee may buy and hold it adversely to the mortgagor.

Lawson's Rights and Remedies, Vol. 6, Sec. 3031.

There can be no doubt that a mortgagee can make a *bona fide* purchase of the equity of redemption—*if indeed we may use these terms in the present condition of the law as to mortgages in this State*—and thereby acquire an absolute title. * * * Independent of authority, no argument is necessary to show that, *upon principle*, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged property that he has in respect to any other property.

Green vs. *Butler*, 26 Cal., 601, 602–3.

The California Code contemplates the extinguishment of a mortgage lien by conveyance to the mortgagee in satisfaction of the debt.

Civil Code, Sec. 2910.

The rule which prohibits a trustee from purchasing the property of a *cestui que trust* stands upon the proposition stated by the Chancellor in *Whichcote* vs. *Lawrence* (3 Ves., 740), that one who undertakes to act for another in any matter shall not in the same matter act for himself. It applies in all cases where the duty which the trustee has to perform in respect to the property is inconsistent with his becoming a purchaser for his own use. * * * Such a purchase * * * is a constructive fraud, because the natural tendency is mischievous and harmful. * * * Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. *It is clear that no trust relation between the mortgagor and mortgagee* is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title to the land, or the right of possession, before or after the mortgage debt becomes due. *He owes the mortgagor no duty to protect the equity of redemption.* * * * He may buy in any outstanding title and hold it against the mortgagor. (*Cameron* vs. *Irwin*, 5 Hill, 280; *Williams* vs. *Townsend*, 31 N. Y., 415; *Shaw* vs. *Bunny*, 13 Week. R., 374; S. C. 2 De G., J. & S., 468.) There is, in truth, no relation analogous to that of *trustee* and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title, because under our law, he has no title whatever. (*Kortright* vs. *Cady*, 21 N. Y., 342, and cases cited.) *He may deal with the mortgagor in respect to the mortgaged estate, upon the same footing as any other person;* he may buy in incumbrances for less than their face, and hold them against the mortgagor for the full amount; *he may do what*

any other person may do, and his acts are not subject to impeachment, simply because he is a mortgagee. (*Darcy* vs. *Hall*, 1 Vern., 48; *Knight* vs. *Majoribanks*, 2 Mac. N. & G., 10; *Chambers* vs. *Waters*, 3 Sim., 42; 3 Sug. on V. and P., 227.)

Ten Eyck vs. *Craig*, 62 N. Y., 419–422.

In *Hyndman* vs. *Hyndman* (19 Vt., 13), the rule requiring a mortgagee to show affirmatively that a sale of the equity of redemption was fair and adequate, is expressly grounded upon the theory of a trust relation, giving the *cestui que trust* an option to avoid it unless such showing is made; while the distinction is recognized that in New York, where such purchases are allowed, it is incumbent upon the mortgagor to impeach the fairness of the sale.

It is again affirmed in a recent case in New York that the relation of trustee and beneficiary does not exist between mortgagor and mortgagee.

Mills vs. *Mills*, 115 N. Y., 86.

In *Walker's Administratrix* vs. *Farmers' Bank* (14 Atl. Rep., 819), the Supreme Court of Delaware say:

In Delaware, between mortgagor and mortgagee, there is not any such fiduciary or other relation as will prevent the latter from purchasing the entire interest of the former in the mortgaged premises. In England and some of the American States, the early common law doctrine prevails, to greater or less extent, that the mortgagee has the legal title to the mortgaged premises. * * In this State this view has been greatly modified. Here, a mortgage, though in form a conveyance of the land, is a mere security for the payment of money. The mortgagor in possession * * is the real owner of the land, and the mortgagee * * * has but a chattel interest. * * * It is therefore evident that, if the mortgagee may purchase the mortgagor's interest in England and elsewhere, where, under the early common law doctrine, his means and opportunities for oppression and inequitable advantage are relatively greater than in Delaware, he may with equal if not greater reason and propriety be permitted to do so here. And it may also be observed that in a case like the present, where, at the time the controverted

conveyance was made, the mortgagee had neither the legal title to nor the possession of the mortgaged premises, a *less exacting scrutiny* of the transaction may be necessary than where he has either or both of these, and consequently the greater means and opportunities for the *coercion and oppression of the mortgagor* (p. 821.)

In the foregoing case the mortgagee had realized a profit on the resale of the premises after the conveyance to him by the mortgagor, but there being no fraud or oppression practiced by the mortgagee, the conveyance was not disturbed.

In *Chapman* vs. *Mull* (7 Ired. Eq., 292), it was held that the principles applicable to dealings between trustee and *cestui que trust*, as adopted by courts of equity, requiring the trustee "to show affirmatively that such dealing was fair and for a reasonable consideration, so as to exclude the inference that advantage was taken of the relation existing between the parties," does not apply "to the relation existing between mortgagor and mortgagee." The court says:

Dependence and the duty of protection are not involved in the relation. The parties have definite rights, stand at "arm's length," and may deal, subject only to the ordinary principle; with this difference—the relation is always a circumstance which creates suspicion and aids in the proof of *an allegation of oppression and undue advantage, where there is a gross inadequacy of price, and other circumstances tending to show fraud* (pp. 294–5.)

This authority shows clearly that the mere allegation of existence of the relation of mortgagor and mortgagee, and of the fact that the price agreed upon was less than full value, cannot constitute a cause of action where no ultimate facts are alleged showing *oppression* and *undue* advantage or *fraud*.

Review of Appellant's Authorities.

The cases cited by complainant's counsel, where the old rule growing out of a trust relation between mortgagor and mortgagee is applied (which rule has no application in California), do not sustain such a bald position as that taken by counsel.

In the case of *Peugh* vs. *Davis* (96 U. S., 332), the original mortgage was by deed absolute on its face, passing the legal title and leaving a mere equity of redemption; and there was no satisfactory proof that the equity of redemption was ever released. The pretended release was for a *grossly* inadequate price, and the mortgagor remained in possession. The court held that a subsequent release might be made of the equity of redemption; that there is nothing in the policy of the law forbidding it, but that such release must be clearly shown and "*appear by a writing importing in terms a transfer of the mortgagor's interest;*" and "must also be for an adequate consideration; *that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity.*" (96 U. S., 337.)

There is no allegation in this complaint that the price paid for the conveyance would be deemed unreasonable if the transaction was between other parties dealing in similar property; and it seems evident that a difference between a valuation of $204,000 and $230,500, for the same parcel of land, is not more marked than might exist between buyer and seller in any negotiation. The difference is certainly not such gross inadequacy as to shock the moral sense, and be demonstrative of fraud.

It appears from the complaint that the circum-

stances of *Peugh* vs. *Davis* do not exist in the case at bar. No title here passed by the mortgage, but the mortgagor has conveyed the legal title by unmistakable terms of grant, and does not appear to have remained in possession after the conveyance; and there is no such *marked* or *gross* inadequacy of consideration as existed in *Peugh* vs. *Davis*.

In *Sheckell* vs. *Hopkins* (2 Md. Ch., 90, 91), cited for complainant, it was held that where no disposition or attempt appears on the part of the mortgagee to influence the mortgagor to part with the property at an undervaluation, or to coerce the will or influence the conduct of the mortgagor, the case stands free from every possible prejudice which could be brought to bear against it because the property was mortgaged to the former.

In *Goodman* vs. *Pledger* (14 Ala., 114), the complaint, wholly unlike that in the case at bar, alleged that it was understood and agreed that the conveyance obtained from the mortgagor was a security for indebtedness, and was obtained under the assurance that time would be allowed for repayment of the purchase money. The court held, upon the preponderance of evidence, that the conveyance was a mortgage, and that it was obtained under inequitable circumstances; and remarked that where a mortgagee has "used his mortgage for the purpose of *coercing* the mortgagor to sell the equity of redemption for less than its value and *for less than others would have given at a fair sale*," the chancellor should interfere and hold that the mortgagor may still redeem.

There is nothing in the case at bar to indicate that the price paid for the property was less than

others would have given at a fair sale, and no agreement for a mortgage security, or *coercion* of the mortgagor, is alleged.

In *Baugher* vs. *Merryman* (32 Md., 185, 191), the deed was procured by urgent solicitation of the mortgagee, without paying any money for it, and by pressing upon the mortgagor the alternative of being turned out of house and home, or being allowed to remain if the property was conveyed. The bill alleged that the deed was intended only as a further means of securing the debt, and was given on the distinct understanding that all the proceeds of resale above the debt, interest and expenses, should be paid to the mortgagor. The bill also charged fraud in the procuring of the conveyance; and in all of these respects, that case is wholly unlike the case at bar.

In *Perkins* vs. *Drye* (3 Dana, 170, 177), the conveyance to the mortgagee was alleged to have been intended as a mortgage, and to have been executed upon an understanding that the time for redemption was to be extended. The court held that there was no colorable consideration for the conveyance; that it was false upon its face; and that the court would *set aside such sale*, and allow the mortgagor to redeem, when, by *the influence* of his incumbrance, it appears that the mortgagee has obtained a conveyance "*for less than others would give.*"

It neither appears in the present bill what others would have given for the complainant's property, nor that defendant used his incumbrance, or any other means, to prevent the complainant from finding another purchaser, if possible, who would pay

more for her property than the defendant was willing to pay.

Counsel for complainant is unfortunate in citing the case of *Barnes* vs. *Brown* (71 N. C., 509), as sustaining the present bill. That case holds that the mortgagee may purchase the equity of redemption from one to whom the original mortgagor has assigned or transferred it, and that *in the absence of fraud, and of any agreement to the contrary*, he acquires by such purchase an absolute estate in the land, and his mortgage debt is extinguished.

The complaint in this case does not show that the complainant was the mortgagor, or was personally responsible to the mortgagee for the indebtedness. *Non constat*, but that she may be the grantee of the mortgagor. If so, the decision in *Barnes* vs. *Brown* is an authority directly against her.

In *Dougherty* vs. *McColgan* (6 Gill. & J., 275), the conveyance to the mortgagee was *accompanied by a defeasance*, and the main question was whether it was the *intention of the parties* to create a security for indebtedness or a conditional sale, and it was held that the intention was one of security.

In *Holridge* vs. *Gillespie* (2 Johns. Ch., 30), the court applied the *doctrine of trusts* to a *mortgagee in possession*, who, by advantage of his possession, had obtained a new lease of the premises, of which it was held that he was *trustee* for the mortgagor; and the court also held that a release obtained by the mortgagee of the equity of redemption of one-half of the mortgaged premises, *without consideration*, by an agreement which was false *on its face*, would not be sustained in equity or allowed to bar a right of redemption.

In *Linnell* vs. *Lyford* (72 Me., 282), it was held that a deed of the equity of redemption in *mere consideration of the mortgage deed*, without any new consideration, where the mortgage deed was *accompanied by a defeasance* agreeing to quit-claim the property to the mortgagor upon payment of the mortgage debt, the mortgage notes not being surrendered, was but a security for the same indebtedness.

In *Odell* vs. *Montross* (68 N. Y., 504), the title of the mortgagor was held not to have been extinguished by a mere payment of fifty dollars, accompanied by a written receipt *not purporting to convey or transfer any interest in lands.* The *obiter* remarks of the court as to avoiding a purchase "for *fraud*, actual or constructive, or for any *unconscionable advantage* taken by the mortgagee in obtaining it," and that "it will be sustained only when *bona fide;* that is, when in all respects *fair*, and for an adequate consideration," are no authority to sustain the present bill.

In *Villa* vs. *Rodriguez* (12 Wall., 339), the complaint alleged that the conveyance was made from the mortgagor, to the mortgagee *as security* for the mortgage debt; and it appeared that it was for a grossly inadequate consideration; that the mortgagee had acted harshly and oppressively, and drew in the mortgagors to convey by assurances that he was taking the step for their interest, and did not wish to speculate upon them, and leading them to understand that it was only security for the debt. The Court say:

> The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his

grantors were drawn in to convey. To permit him to do so would give triumph to iniquity.

The court further say, in speaking of the relations between mortgagor and mortgagee, and the principles that apply when the equity of redemption is purchased by the mortgagee:

Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character.

The case shows that Rodriguez not only assumed to be a trustee of the legal title, but that he was the *brother* of the widow, and *uncle* of the children whom he sought to defraud.

The language of the decision must be construed in connection with the context and the facts of the case; and when so construed there is nothing in the case to sustain the position assumed by the complainant's counsel in reference to the present bill.

In *Russell* vs. *Southard* (12 How., 154), cited for complainant, the court say:

But *strong expressions, used with reference to the particular facts under consideration,* however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the *mortgagee in possession* may exercise an undue influence over the mortgagor, especially, if the latter be in needy circumstances, the purchase by the former of the *equity of redemption,* is to be carefully scrutinized, *when fraud is charged;* and that only *constructive fraud* or an *unconscientious* advantage *which ought not to be retained,* need be shown to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that any one would have been willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist.

The facts of the case showed that the original mortgage was by deed absolute, with a separate

agreement to reconvey, which the defendant claimed created only a conditional sale, but which the court declared constituted the transaction a mortgage. It is evident that the title passed to the mortgagee, leaving only an equity of redemption in the mortgagor. The surrender of this equity was obtained by the mortgagee by securing a delivery up of the defeasance without consideration, although the mortgage was for only about one-third of the total value of the land. It was held that the obtaining of the equity of redemption under such circumstances was constructively fraudulent, and the deed was held to remain a mortgage.

No such state of facts or circumstances appear in this case, and the doctrine of *Russell* vs. *Southard*, notwithstanding the evident trust relation between the parties, is against the contention of the complainant in this case, where there is not a shadow of trust relation, and no pretense that the deed was intended as security for indebtedness, and the consideration paid therefor was at least 204-230ths of the value of the land, including $19,000 in cash, besides the mortgage indebtedness.

The case of *Patterson* vs. *Yeaton* (47 Me., 306,) is inapplicable, as it turns wholly upon the failure to revest title under an oral agreement to purchase an equity of redemption by the mere surrender to the mortgagee of an unrecorded deed which the mortgagee had given to the mortgagor when the mortgage was taken, the mortgage remaining uncancelled of record, after the oral agreement was made.

The case of *Ford* vs. *Olden* (L. R. 3 Eq. Cas., 461), was a case in which a sale by a bankrupt mortgagor

of his equity of redemption to the mortgagee for a greatly inadequate consideration was set aside on a bill by his assignee in bankruptcy as being fraudulent and void *as to the creditors of the bankrupt*, on the ground that the mortgagee had used pressure and *purchased for less than others would have given.* the Vice-Chancellor cites the opinion of Lord Redesdale "that the courts view transactions between the mortgagee and mortgagor with jealousy, and will set aside the sale of the *equity of redemption* where, *by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase.*"

In the case of *McKinstry* vs. *Conly* (12 Ala., 683,) reference is made *obiter* to authorities decided under the old system of distinction between the legal title and the "equity of redemption," as between mortgagor and mortgagee, holding that a court of equity "will protect the mortgagor against contracts entered into with the mortgagee, impairing or destroying the *equity of redemption. From the relative condition of the two parties* it looks with jealousy on all such contracts. It will not tolerate a clause in the mortgage that the mortgagor shall not redeem, as that is an inseparable incident of the contract, and will relieve against a sale of the *equity of redemption* for a *grossly inadequate price*, from the *power* which the mortgagee has over the mortgagor." Yet the case *decides* that this principle had no application to the case made before the court.

There evidently can be no *equity of redemption* in any true or proper sense unless there is a legal title in the mortgagee. And it is evident that where an

advantage is given at law by the possession of the legal title after condition broken, and equity must regard the owner of the legal title as a trustee of the mortgagor for the protection of the latter, it may consistently apply the rules governing a trust relation to dealings between the parties.

The case of *Toomes* vs. *Conset* (3 Atk., 261), merely expresses the familiar rule of equity that it will not permit any agreement in a mortgage that the estate shall become absolute in the mortgagee in any event, so as to vest an indefeasible estate at law. It has no application here.

In the case of *Vernon* vs. *Bethell* (2 Eden, 110), there was a clear showing that the deed was taken as a security, and as an easy mode of obtaining possession as mortgagee, there being no intention to cancel or merge the mortgage, and a redemption was therefore decreed.

The foregoing are all of the cases cited by appellant on the question of her right to redeem, and none of them sustain the contention here made, even upon the theory that there is an *equity of redemption*, in the proper sense, in a mortgagor as against a mortgagee who holds the legal title in trust for him.

But there is no such equity of redemption in this State, and no reason appears why a mortgagor and mortgagee should not deal with each other in this State in all respects as independent contracting parties, subject to the ordinary rules governing contracts. No ground appears under any of those rules for avoiding the executed contract set forth in the bill.

It is evident that there can be no right of re-

demption in this case without an avoidance in equity of the conveyance of complainant to defendant. There is no pretense that that conveyance was *intended as a security* for the cash paid therefor, or for the prior mortgage indebtedness, the lien of which was extinguished by the deed given in satisfaction thereof.

Civil Code, Sec. 2910.

There is no ground stated in the bill upon which a court of equity would be justified in avoiding that conveyance, and the demurrer was properly sustained for that reason.

II. Limitation and Laches.

The demurrer was also properly sustained on the ground of limitation and laches.

The case of *Hall* vs. *Arnott* (80 Cal., 355, 356), has no application, for the manifest reason that in this case, unlike that, the cause of action depends upon the *setting aside* in equity of an absolute conveyance, and the enforcement of a *constructive trust*, before there can be any pretense of a right to redeem; and that cause of action is clearly barred by limitation and laches.

Michoud vs. *Girod* (4 How., 561), and *Manning* vs. *Hayden* (5 Sawy., 380), were expressly distinguished as cases of *actual fraud*, creating a *constructive trust*, and yet it was admitted by both those cases that courts of equity, even in cases of exclusive jurisdiction, act *in analogy* to the statutes of limitation, though not governed by them.

But it has been expressly and repeatedly adjudged that where State courts have *concurrent jurisdiction*

of a case of equity cognizance, the State Statute of Limitations applicable to such a case is *obligatory* upon the Federal courts of equity.

Norris vs. *Haggin*, 12 Sawyer, 47.
Miller vs. *McIntyre*, 6 Pet., 67.
Badger vs. *Badger*, 2 Wall., 94.
Broderick's Will, 21 Wall., 518.
Sullivan vs. *Portland and K. R. R. Co.*, 94 U. S., 811.
Coddington vs. *Pensacola and Ga. R. R. Co.*, 103 U. S., 409.

A cause of action to enforce a constructive trust is barred in four years, if the *cestui que trust* is not in possession, and the action is not based upon fraud.

C. C. P., Sec. 343.
Lakin vs. *Sierra Buttes Co.*, 11 Sawyer, 244 *et seq.*
Curry vs. *Allen*, 34 Cal., 254.

The four years' limitation of Sec. 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity.

Piller vs. *S. P. R. R. Co.*, 52 Cal., 42.

Where the relief must proceed upon the ground of fraud, the limitation is three years after the facts were or might have been discovered.

Norris vs. *Haggin*, 12 Sawyer, 47.
Curry vs. *Allen*, 34 Cal., 254.

The same limitation applies to cases of constructive fraud.

Boyd vs. *Blankman*, 29 Cal., 20, 21, 46.

When no time of the discovery of fraud is al-

leged, the facts must be presumed to have been known to the complainant at the time of or immediately after their occurrence.

Sublette vs. *Tinney*, 9 Cal., 425.
LeRoy vs. *Mulliken*, 59 Cal., 281.

The limitation against relief in equity begins to run as soon as the party might have applied to a court of equity for relief.

Norris vs. *Haggin*, 12 Sawyer, 56–7.
Story's Eq. Jur., Sec. 1521*a*.

The ordinary rules of limitation apply as against an *implied* or *constructive trust*, and the statute runs *from the date of the acts charged* as constituting it.

Lammer vs. *Stoddard*, 103 N. Y., 673.
Mills vs. *Mills*, 115 N. Y., 86.
Wilmerding vs. *Russ*, 33 Conn., 68, 77.

The demurrer was also properly sustained upon the ground of laches, no facts or circumstances being alleged to excuse the delay of nine years in filing this bill.

No formal plea of the statute of limitations is necessary to raise the defense of laches, neglect or acquiescence, in a court of equity, and equity will act by analogy to the State statute and dismiss the bill for laches whether the State statute is properly pleaded or not.

Lakin vs. *Sierra Buttes Co.*, 11 Sawy., 232, 242.
Sullivan vs. *Portland, etc., R. R. Co.*, 94 U. S., 811.
Harris vs. *Hillegras*, 66 Cal., 79.

Since all the relief that could be granted to the

complainant upon this bill is such as might be granted if she had attempted to rescind the contract, she should be held responsible in equity for the same laches which she has shown in respect to its rescission.

It is well settled that upon the discovery or knowledge of facts constituting a fraud which has induced a contract, the defrauded party must promptly elect whether he will rescind the contract or not, and if he once evinces an intention not to rescind, the contract becomes as to him irrevocably established.

Unless a contract or conveyance is rescinded with reasonable diligence, it becomes irrevocable, and the lapse of many months or years without any notice of rescission or offer of restitution, is a bar to an annulment or cancellation of the contract or conveyance in equity.

Civil Code, Secs. 1689, 1691.
Fratt vs. *Fiske*, 17 Cal., 380.
Hammond vs. *Wallace*, 24 Pac. Rep., 837.
Davis vs. *Read*, 37 Fed. Rep., 423–4.
Barfield vs. *Price*, 40 Cal., 535.
Bohall vs. *Diller*, 41 Cal., 533.
Collins vs. *Townsend*, 58 Cal., 615, 616.
Burkle vs. *Levy*, 70 Cal., 250.
Bailey vs. *Fox*, 78 Cal., 396.

A party seeking equitable relief to cancel a conveyance upon the ground of fraud "*must, upon discovery of the facts, at once announce his purpose and adhere to it,*" and will not be permitted to "play fast and loose," or speculate upon a change in value of the property.

Grymes vs. *Sanders*, 93 U. S., 55, 62, and cases cited.

An attempt to fasten on a purchaser a *constructive trust*, even though he occupied a *confidential relation*, must fail unless made *within a reasonable time;* and even the statutory time will not be allowed if the party having the right stands by and sees another dealing with the property in a manner inconsistent with the trust, *and makes no objection.*

Ashhurst's Appeal, 60 Penn., 290, 316.

We submit that, for the foregoing reasons, and for the reasons clearly and ably set forth in the opinion of Judge Hawley, hereto appended, the judgment should be affirmed.

WM. F. HERRIN,
Solicitor for Appellee.

H. L. GEAR,
Of Counsel.

Opinion of Hon. T. P. Hawley, U. S. District Judge, in De Martin vs. Phelan.

Circuit Court, N. D. California. September 14, 1891.

(*Reported in 47 Federal Reporter, pp. 761–5.*)

MORTGAGES—REDEMPTION—INADEQUACY OF CONSIDERATION.

Complainant, in her bill praying that she be allowed to redeem certain property, alleged that on a named date she was the owner of such property, subject to mortgage liens for some $185,000; that thereupon defendant had purchased these liens "as a means of securing title to said property, and for no other purpose," and had foreclosed them; that at this time complainant was in indigent circumstances, without available means of support for her family, and defendant, knowing her destitute state, took advantage of his position, and by means of this mortgage indebtedness induced complainant to sell him her equity of redemption for the sum of $19,000, it being worth at least $45,000, as defendant then knew. *Held* that, in the absence of allegations of fraud, undue influence, or confidential relations, the bill is without equity.

In equity. Bill to redeem land from mortgage.

Geo. D. Collins, for complainant.

Wm. F. Herrin, for defendant.

HAWLEY, J. (*orally*). The defendant demurs to complainant's bill in equity, praying for a decree allowing her to redeem certain property, and for an accounting of the rents, issues, and profits therefrom since November 4, 1881. The bill alleges that on November 4, 1881, complainant was the owner in fee of certain lands, specifically described in the bill, situated in Santa Clara County; that at said date, and for some time prior thereto, said property was subject to mortgage liens, two of which were held by the Bank of San Jose and the other by David Belden, aggregating the sum of $185,000; that the liens held by the Bank of San Jose were foreclosed on the 13th of August, 1881, by judgment and decree of the Superior Court in Santa

Clara County; that prior to said decree "all of said mortgage liens were assigned and transferred to said defendant; that said defendant purchased said mortgage indebtedness as a means of securing the title to said property, and for no other purpose;" that at the time of said purchase complainant "had no available means of support for herself and family, and was in indigent circumstances and in great need, and such continued to be her condition up to and including the 4th day of November, 1881, all of which said defendant well knew; * * * that said defendant thereupon took advantage of the destitute condition of your oratrix, and by means of the said mortgage indebtedness purchased by him as aforesaid, induced your oratrix to transfer the said property to him in consideration of the sum of nineteen thousand dollars;" that thereupon, on the 4th day of November, 1881, "your oratrix did make, execute, and deliver to said defendant a deed of conveyance of said property in consideration of the said sum of nineteen thousand dollars, and because of the helpless and destitute condition aforesaid, of which said defendant took advantage in securing said deed; that at the time of the purchase of said mortgage indebtedness, * * * and thence until the said 4th of November, 1881, the interest of your oratrix in said property, to wit, the equity of redemption, was of the value of forty-five thousand five hundred dollars and more, which the said defendant during all said times knew, and in taking the interest of your oratrix in said property, and paying therefor the sum of nineteen thousand dollars, the said defendant took advantage of his position as holder of said mortgage indebtedness,

and of the helpless and poverty-stricken condition of your oratrix." Under these averments, what were the inducements held out by the defendant, which caused her to sell her equity of redemption? Did he make any false representations as to the value of the property? How did defendant take advantage of complainant's destitute condition? There is no allegation in the bill of any fraud on the part of defendant. There is no averment that any relations of confidence or trust existed between the parties, no claim that the deed of the equity of redemption was intended as a mortgage, no pretense that any fraudulent representations of any kind were made; no steps were taken by defendant to prevent other parties from buying complainant's interest in the property. There are no averments that defendant, either in purchasing the mortgage liens or procuring the deed, took any unfair or grossly oppressive advantage of complainant's necessities, or in any manner exercised any undue or improper influence over the complainant. He seems simply to have made an offer for her interest which, on account of her necessities, and the embarrassed condition of the property, she accepted. The bill avers that defendant's object in purchasing the mortgage liens was to secure the title to the property, and that by said purchase, and the knowledge that complainant was without means, and in a helpless and destitute condition, he gave her only $19,000 for her equity of redemption at a time when he knew that her interest in the property was worth at least $45,000.

Complainant seeks to maintain this action upon the theory that a mortgagee holds a financial ad-

vantage over the mortgagor which, of itself, has a tendency to prevent him from dealing with the mortgagee on an equal footing, and that such a relation places the mortgagor under the power of the mortgagee and destroys free agency. In support of this theory counsel for complainant contends that in cases of this character the principles of law are almost as stern and inflexible as those which govern transactions between a *cestui que trust* and his trustee, and that the sale of the property, under such circumstances as are alleged in the bill, will never be sustained, unless *bona fide*, and for a full, fair, and adequate consideration. Can this contention be sustained? What is the relation of mortgagor and mortgagee? Under the law of California, and most of the other States, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure. He can at any time make a *bona fide* purchase of the equity of redemption or interest of the mortgagor, and thereby acquire an absolute title to the mortgaged premises. There is no trust relation between the mortgagor and the mortgagee when unaccompanied by possession. The mortgagee does not owe the mortgagor any duty to protect the equity of redemption. There is no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. No fiduciary character exists between them which prevents the mortgagor from buying the property at foreclosure sale, and holding the title thus acquired adversely to the mortgagor. The mortgagee can at all times deal with the mortgagor in respect to the property mortgaged precisely

upon the same footing as any other person, and may purchase liens or claims against the property for less than their face value, and hold them against the mortgagor for the full amount. Under these general principles, which are well settled and supported by numerous authorities,—*Green* vs. *Butler*, 26 Cal., 601; *Ten Eyck* vs. *Craig*, 62 N. Y., 421; *Walker* vs. *Bank* (Del. Err. & App,), 14 Atl. Rep., 823; 6 Lawson, Rights, Rem. & Pr., § 3031,—how can it consistently be claimed that the averments of the bill in this case are sufficient to maintain this action? Parties who are in poor and destitute circumstances, if they have any property, and wish to dispose of it, are often compelled by their necessities to sell their property for less than its real value; but if they obtain all that they ask for it, or voluntarily accept what is offered, and there is no fraud, deceit, oppression, improper or undue influence, or confidential relations existing between them, courts of equity have no jurisdiction, power, or authority to set aside such transactions. There is in most cases a contest between the purchaser and the seller of real property; the purchaser usually endeavoring to buy the property at the lowest price the owner is willing to take, and the owner trying to get the highest price the purchaser is willing to pay. In a certain sense the purchaser, with ready money at his command, takes advantage of the circumstances of the owner who is poor, and by reason of his poverty is willing to sell for whatever is offered. When the parties are dealing at arms-length in the open market, and no unfair or improper measures are used or misrepresentations made, it would be absurd to say that a court of equity, years afterwards,

when the party selling had met with financial success, and acquired sufficient means to repay the purchase money, could be called upon to annul the sale. It is only in cases where the *bona fides* of the transaction is called in question, and when fraud or other like causes above enumerated is alleged, that courts of equity are authorized to interfere. In such cases the relation of mortgagor and mortgagee is "always a circumstance which creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, where there is a gross inadequacy of price, and other circumstances tending to show fraud." *Chapman* vs. *Mull*, 7 Ired. Eq., 294. The authorities cited and relied upon by complainant are cases of this character. Thus, in *Peugh* vs. *Davis*, where the action was to set aside a release of the equity of redemption, it being alleged and claimed that the money paid for the release was in fact a further loan of money, and that the release was given only as security for such loan, and the question to be determined was as to the true character of the transaction, the court very properly said that the transaction will "be closely scrutinized, so as to prevent any oppression of the debtor; * * * that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. * * * The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties, dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding." 96 U. S., 337. The same rule was applied in *Villa*

vs. *Rodriguez*, 12 Wall., 323, to enable the court to determine whether a deed absolute upon its face was a mortgage. In *Russell* vs. *Southard*, 12 How., 154, the same doctrine is announced and applied to a mortgagee in possession of the property, where the question of the purchase of the equity of redemption was in dispute. The court, in the course of the opinion, indicating the necessity of confining the rule to the proper class of cases, said:

> But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that any one would be willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist.

The general principles announced in these and other cases cited by complainant, when applied to a similar state of facts, should always be followed; but they have no application to the particular facts of this case, and cannot be considered as authorities in support of the theory upon which complainant relies to sustain this action. To determine the character of the transaction, it would be unfair to confine the consideration solely to the alleged valuation of complainant's interest and the amount paid by defendant therefor. To be just to both parties, the entire transaction should be inquired

into. Is it reasonable to believe that any other person, with knowledge of the amount of the mortgage liens, in the light of the foreclosure proceedings, the accumulated costs and interest on the money, and the limited time allowed for redemption, would have paid more than $19,000 for complainant's interest in the property? The fact that $204,000 was paid for property alleged to be worth $230,500, under such circumstances, certainly does not show such a marked undervaluation or inadequacy of price as would, of itself, shock the conscience, or raise any presumption of fraud or undue advantage that would justify a court of equity to annul the sale. The demurrer is sustained.